in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

NO. 74-545

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD,
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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on July 10, 1974 and August 8, 1974, respectfully.

OPINION BELOW

The Opinion of the Court of Appeals,[1] the decision and Order of the National Labor Relations Board,[2] and the decision of the Administrative Law Judge (then Trial Examiner)[3] all appear in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 8, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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[1] *Laborers' International Union of North America, AFL-CIO, Local 478 v. National Labor Relations Board*, No. 73-1819 (CADC 1974).

[2] *Laborers' International Union of North America, AFL-CIO, Local 478 (International Builders of Florida, Inc.) and L. R. Wilson, an Individual*, 204 NLRB No. 32 (1973).

[3] *Trial Examiner's Decision*, Case 12-CB-1170.

QUESTIONS PRESENTED

I.

DOES THE BOARD HAVE AUTHORITY TO AWARD BACK PAY TO A SUPERVISOR DISCHARGED AS A RESULT OF A §8(b)(1)(B) VIOLATION?

II.

MAY THE BOARD OR A COURT CONSTITUTIONALLY AWARD BACK PAY TO A SUPERVISOR WHO PERPETRATED RACE DISCRIMINATION UPON HIS CREW, WHICH DISCRIMINATION TRIGGERED THE CONDUCT FOUND VIOLATIVE OF §8(b)(1)(B) PARTICULARLY WHEN THE UNLAWFUL CONDUCT DID NOT CONSIST OF FORCING THE SUPERVISOR'S DISCHARGE?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §151 et seq., hereinafter "Act" and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e) et seq.) are set forth in the Appendix.

STATEMENT

A. Statement of Facts

On August 5, 1970 members of Petitioner Local 478 struck the employer upon learning that it had demoted one Eugene Davis, a black assistant foreman, back to laborer since, in the employer's opinion, the job did not warrant two foremen. L. R. Wilson, a white head foreman, was retained as sole foreman. The union business agent, upon learning of the members' reason for engaging in the strike, advised the employer that the strike would end if Davis were reappointed; and the employer promptly made the appointment. Wilson was later discharged because the job did not require two foremen.

At the hearing before the Administrative Law Judge, the union offered to introduce evidence that the reason the laborers struck when Davis was demoted was because they objected to Wilson's racially discriminatory treatment of the black laborers, and they were willing to continue working only if Davis stood between Wilson and the laborers as a "buffer." The Administrative Law Judge excluded the proffered evidence as irrelevant to a determination of whether Local 478 violated §8(b)(1)(B) of the Act, 29 U.S.C. §158(b)(1)(B).

B. The Board's Decision and Order

On the above facts, the Board concluded (Member Jenkins dissenting) that Local 478 had restrained and coerced the employer in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by insisting that Davis be reappointed as assistant foreman.

The Board reasoned that although Local 478 had a protected right to take concerted action to protest Wilson's discriminatory treatment of the laborers, it did not have the right to dictate that Davis be reappointed. Accordingly, the issue of Wilson's race discrimination was deemed irrelevant to the violation found.

The Board's Order, which adopted without comment the recommended Order of the Administrative Law Judge, required Petitioner to make Wilson whole for any loss of earnings he may have suffered by virtue of the unlawful conduct "which caused the Employer to discharge him as the general foreman. . . ."

C. The Decision of the Court of Appeals

The Court upheld the Board's conclusion that the issue of Wilson's race discrimination toward his crew was irrelevant to a determination of the §8(b)(1)(B) violation under these facts, since the laborers' protest was directed at the appointment of a particular foreman rather than at the discriminatory conduct itself.

This test, advanced by the Board and adopted by the Court, represented a reasonable harmonization of Sections 7 and 8 of the Act[4] under the facts of this case, said the Court, since that test permits employees to engage in §7 concerted activity challenging race discrimination but limits the demands that may be made on the employer to remedy it.

Accordingly, the Board's Decision and Order, including back pay to Wilson, was affirmed.

[4]Concerted action to protest conduct prohibited by Title VII has been construed to be included within the protection of Section 7.

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT

The decision of the Court below in the instant case is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Silver Bay Local Union No. 962, International Brotherhood of Pulp, Sulphite & Paper Mill Workers*, AFL-CIO, 498 F.2d 26 (CA9, 1974).

The decision in *Silver Bay* was rendered May 22, 1974, too late for Petitioner to rely upon it as a basis for argument to the Court below in the instant case.[5]

There, the Board had found a §8(b)(1)(B) violation against the union and had issued an order identical to the one here, including the provision that the supervisor be made whole for any loss of earnings occasioned by the unlawful conduct. The Ninth Circuit noted that not one case could be found wherein the Board had previously awarded back pay to a supervisor as the result of a

[5]All briefs in the instant proceeding had been submitted by April 19, 1974. Oral argument was had on June 3, 1974. The back pay issue was, however, brought out in Petitioner's briefs in connection with the point presented to the Circuit Court; and the Board had brought the *Silver Bay* decision to the Court's attention in reference to the claimed irrelevance of Wilson's race discrimination.

§8(b)(1)(B) violation; and it therefore remanded the question to the Board for further explanation.[6]

The Court, in passing on the question, found that since supervisors are not protected under the Act, awards of back pay to them were held proper only where the supervisor's discharge by the employer interfered with the rights of the ordinary employees, or where failure to reimburse the supervisor would impair the effective functioning of Board machinery. However, since §8(b)(1)(B) protects the rights of employers, not employees, a back pay award to a supervisor as the result of a §8(b)(1)(B) violation could not be defended on either of those rationales.

We submit that since supervisors are expressly excluded by §2(3) of the Act from the protection afforded ordinary employees by §§7 and 10(c), the Board is totally without authority to issue such awards.

Here, that situation is exacerbated by the dual facts that Wilson is effectively being rewarded for perpetrating race discrimination; and the violation found by the Court below consisted *not* of Petitioner causing Wilson's discharge, but rather of Petitioner causing Davis' reappointment.

We submit that the conflict now existing between the District of Columbia Circuit and the Eighth Circuit should be resolved by the Court so that the question of the Board's authority to issue back pay awards to supervisors dis-

[6]The issue is now pending before the Board on remand. *Silver Bay Local Union No. 962, International Brotherhood of Pulp, Sulphite and Paper Mill Workers*, No. 18-CB-1700.

charged by virtue of a §8(b)(1)(B) violation may be finally settled. The Board has continually attempted to expand the scope and application of §8(b)(1)(B) to areas not encompassed by the literal terms of that Section; and the instant conflict marks yet another excursion into a hitherto unexplored and unexplained deviation from the language of the Act.

Review is therefore warranted.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT AND REWARDS A SUPERVISOR FOR HIS RACE DISCRIMINATION.

The decision of the Court below in the instant case conflicts in principle with the decision of the Court of Appeals for the Eighth Circuit in *National Labor Relations Board v. Mansion House Center Management Corporation*, 473 F.2d 471 (CA8, 1973).

In *Mansion House*, the issue was whether evidence of a union's racially discriminatory membership requirements was relevant to a determination of a refusal to bargain charge brought by the union against a company pursuant to §8(a)(5). Judge Lay, speaking for the Court, concluded that the Board's action in requiring an employer to bargain with a discriminatory union constituted recognition or enforcement of illegal racial policies by a federal agency, which is proscribed by the Due Process Clause of the Fifth Amendment.

The question presented here is substantially identical to that presented in *Mansion House;* since in upholding the Board's position that Wilson's race discrimination is irrelevant to a §8(b)(1)(B) violation, where the Board has ordered back pay to the discriminatory supervisor as the remedy for that violation, the Court below has upheld the Board's approval of Wilson's discrimination.

We submit that there is substantial disagreement as to the proper scope and application of Title VII policies in determining unfair labor practices and ordering remedies. There is no rational distinction to be made between Board approval of a union's race discrimination and Board approval of a supervisor's race discrimination. In either case, we submit that neither Board nor judicial enforcement of private discrimination can be constitutionally sanctioned.

We submit that unless the conflict now existing between the District of Columbia Circuit and the Eighth Circuit is resolved by this Court, the scope of Title VII principles and their application in determining §8(b)(1)(B) violations and appropriate remedial orders in situations where supervisors engage in unlawful race discrimination will remain shrouded in doubt and continuing conflict as to legal rights and remedies throughout the country. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

THOMAS J. PILACEK
Attorney for Petitioner

Dated: October 31, 1974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1819

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[Filed, Aug. 8, 1974]

JUDGMENT

Before: Bazelon, Chief Judge, TAMM and LEVENTHAL, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Laborers' International Union of North America, AFL-CIO, Local 478, to review an order of the National Labor Relations Board issued against it on June 22, 1973. The Court heard argument of respective counsel on June 3, 1974, and has considered the briefs and transcript of the record filed in this cause. On July 10, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be

enforced and that Laborers' International Union of North America, AFL-CIO, Local 478, its officers, agents and representatives abide by and perform the directions of the Board in said order contained.

s/ David L. Bazelon

DAVID L. BAZELON
Chief Judge, United States Court of Appeals for the District of Columbia Circuit

s/ Edward Allen Tamm

EDWARD ALLEN TAMM
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

s/ Harold Leventhal

HAROLD LEVENTHAL
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

App. 3

[TITLE OMITTED]

Petition for Review of An Order of the National Labor Relations Board

Decided July 10, 1974

Thomas J. Pilacek, for petitioner.

Patrick Hardin, Associate General Counsel, National Labor Relations Board, with whom John S. Irving, Deputy General Counsel, Elliott Moore, Deputy Associate General Counsel and Robert G. Sewell, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before: BAZELON, Chief Judge, TAMM and LEVENTHAL, Circuit Judges

PER CURIAM: The facts of the case are fully developed in the Decision and Order of the National Labor Relations Board.[1] In brief, members of the Union, laborers at a construction site, went on strike after the employer terminated the temporary appointment of Mr. Davis as assistant foreman, a position that had been created a month earlier when the employer learned of the likely delay in the arrival from another local of the papers certifying the standing of Mr. Wilson, whom the employer had engaged as foreman.[2] The employer concluded that the job did not warrant two supervisors, and Mr. Davis returned to the

[1]Laborers' International Union of North America, AFL-CIO, Local 178 (International Builders of Florida, Inc.) and L.R. Wilson, 201 NLRB No. 32 (June 22, 1973).

[2]The laborers' action began as a wildcat strike, but the union supported the workers, and the union agrees on this appeal that the laborers' actions may be imputed to the union.

job of laborer. Next morning the strike began. When advised by the Union that the strike would end if Davis were reappointed assistant foreman, the employer promptly made the appointment. Wilson was subsequently discharged since two supervisors were not required for the job.

The Board held that the Union, by insisting upon the reappointment of Davis, violated the proscription of § 8(b)(1)(B) of the National Labor Relations Act (Act), 29 U.S.C. § 158(b)(1)(B), which prohibits a union from restraining or coercing an employer "in the selection of his representatives for the purpose of . . . the adjustment of grievances." At the hearing before the Administrative Law Judge the Union offered to show that the laborers struck because they objected to racially discriminatory treatment of the black laborers by foreman Wilson, and were willing to continue with him as foreman only if Mr. Davis, a black, served as his assistant and a "buffer." The Administrative Law Judge excluded the proferred evidence, ruling that it was irrelevant to a determination of the § 8(b)(1)(B) violation. The Union's sole contention on appeal is that the Board erroneously ruled evidence of racial discrimination irrelevant. The issue is sharpened by the concession of Union counsel at oral argument that but for the alleged racial discrimination, the facts as the Board found them establish a § 8(b)(1)(B) violation.

The Union argues that the prohibition of § 8(b)(1)(B) must yield to the right of workers to be free of racial discrimination in their employment. The Board responds that the employees may fully assert their right to nondiscriminatory treatment, through legal remedies as well as self-help measures protected by Section 7 of the Act, so long as they protest the discriminatory treatment and do

not demand the removal or appointment of a particular management "representative." In short, the Board says that protest must be directed, at least in the ordinary case,[3] at the alleged discriminatory conduct, rather than the identity of the supervisor whose conduct is challenged.

We believe the Board's principle is a reasonable harmonization of Section 7 and 8, and that the principle was properly applied in this case. At oral argument, the union counsel assailed the Board's approach by asserting that the Board would find a § 8(b)(1)(B) violation whenever a union protested discriminatory conduct and the employer responded by replacing the offending supervisor. This does not follow, at least if the employer's replacement of the supervisor represents an independent exercise of his judgment as to the person who would best carry out the employer's obligation to refrain from discriminatory treatment.

Our holding is fully consistent with Western Addition Community Organization v. NLRB, ____ U.S.App.D.C. ___, 485 F.2d 917 (1973), cert. granted, ____ U.S. ____ (1974), which held that the mandate of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., must be taken into account in construing the NLRA. We reaffirm that approach, see Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942).[4] In Western Addition the court

[3]In its brief the Board states that this case does not present the question whether §8(b)(1)(B) protects the employer's "deliberate selection of a supervisor so imbued with racial attitudes as to create a discriminatory condition of employment by his mere presence on the job."

[4]See also Gulf States Utilities Co. v. FPC, 411 U.S. 747, 757-60 (1973); McLean Trucking Co. v. United States, 321 U.S. 67, 79-80 (1944); Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 226-228, 399 F.2d 953, 959-61 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 126, 237 F.2d 741, 754 (1956).

confronted the need to reconcile § 7 protection of "concerted activity" (even by a minority of employees) with the principle of union exclusive representation embodied in § 8 of the Act; and the court, in light of the policies rooted in Title VII, held minority action protesting racially discriminatory treatment protected by § 7. Here, the Board fully permits employees to engage in § 7 concerted activity challenging alleged discrimination but holds that the specific prohibition of §8(b)(1)(B) limits the demands that the employees, in the exercise of their rights of concerted activity, may make of their employer. While in Western Addition the court had to reconcile two rather generally-drawn statutory provisions, in the case at bar we confront a specific Congressional limitation on a union's use of coercive economic power. Its specificity limits judicial leeway.

Affirmed.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 12—CB—1170

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478
(International Builders of Florida, Inc.)

and

L. R. WILSON, an Individual

DECISION AND ORDER

On November 4, 1971, Administrative Law Judge Paul E. Wail[1] issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and a motion to reopen the record, and the General Counsel filed an opposition to the motion.

The Board has considered the record and the Administrative Law Judge's Decision in light of the exceptions and brief, the motion, and the opposition thereto and has decided to affirm the findings, rulings, and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order.

We are in agreement with the Administrative Law Judge that Respondent, by insisting that Davis be hired as foreman either in Wilson's place or under Wilson, vio-

[1]The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

lated Section 8(b)(1)(B) of the Act. Contrary to our dissenting colleague, we do not view our decision as barring the protest of the Employer's employees with respect to Wilson's treatment of them, whether or not it was racially motivated. Clearly, Wilson, while a general foreman, was an agent of the Employer and the conditions of employment which he imposed upon the employees were the Employer's conditions. At all times the employees were free under Sections 7 and 13 of the Act to invoke their statutory rights with respect to these alleged unreasonable or unfair conditions. To the extent the Administrative Law Judge's comments in footnote 6 of his Decision may be interpreted as indicating a contrary finding, they are not adopted. This is not to say, however, that the right to strike or engage in concerted activity because of unfair conditions of employment includes the right to dictate to an employer the selection of a particular supervisor, here Davis, who would have the power to engage in collective bargaining or adjust grievances. The Administrative Law Judge found, and we agree, that both Wilson and Davis had the power, and did, adjust grievances for the employees. Under these circumstances, we hold that the Respondent Union, whatever its motivation, could not by restraint and coercion force the Employer to select Davis rather than Wilson for such purposes.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Laborers' International Union of North America,

[2]Accordingly, Respondent's motion to reopen the record is denied.

AFL-CIO, Local 478, its officers, agents, and representatives, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D.C. June 22, 1973.

Edward B. Miller, Chairman

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

MEMBER JENKINS, dissenting:

International Builders of Florida, Inc., herein referred to as International Builders, is engaged in the construction of a school. It has a collective-bargaining agreement with Respondent Union, containing the following clause prohibiting racial discrimination:

> The Union and the employer shall fully comply with all of the requirements of Title VII of the Civil Rights Act and Presidential Executive Order No. 11246 and will comply with all rulings and regulations promulgated under the Order. The Union further agrees to furnish an employer, at

> his request, any statement or data, in proper form, required by Executive Order No. 11246. [Emphasis supplied.][3]

Respondent Union is herein found to have violated Section 8(b)(1)(B) of the Act by engaging in a work stoppage and threatening to engage in further work stoppage with the object of compelling International Builders to either remove Wilson as general foreman or reinstate Davis as foreman in Wilson's place or place him under Wilson as a "buffer" between Wilson and the employees. Respondent Union, in its defense, offered to prove that the employees working under Wilson's direction were "dissatified with the way that they had to perform under Wilson, that he pushed them, that he treated them in an arrogant and cavalier manner, that he didn't care for their difficult job that they had to perform, that he has assigned very difficult tasks to them and that he discriminated against them in the assignment of work to them as to others." More explicitly, Respondent argues that its action "was in response to intolerable racial discriminatory working conditions inflicted upon the employees by Wilson and that its action should [sic] not be deemed unlawful. . . ."

My colleagues take the position that it is "immaterial" to the disposition of this case that the Respondent may have acted in protest of, or to remedy, or at least to isolate, the alleged racial discrimination by International Builders through its selected representative Wilson. Instead, they find it of no apparent concern that Wilson may have practiced racial discrimination in the exercise of his supervisory authority, as alleged, and they reject Respondent's

[3]Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination in employment based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e—2(a), *et seq.*

efforts to reopen the proceeding to receive evidence in this regard. It would appear, by their findings and rulings, that the majority of the Board is herein deciding that under Section 8(b)(1)(B) an employer may with impunity select as its representative for the purpose of collective bargaining or the adjustment of grievances one who unlawfully discriminates against the employees on the basis of race, and that the employees and their collective-bargaining representative are barred from withholding their labor in protest, in an effort to correct or to at least isolate the unlawful actions of the discriminating supervisor. Clearly, in my view, this result distorts our constitutional requirements and our national policy concerning discrimination in employment based on race, is contrary to the explicit collective-bargaining agreement between the parties, and is not mandated by Section 8(b)(1)(B) of the Act.

In examining the constitutional requirements of our national labor policy concerning discrimination in employment based on race, an appropriate starting point is the United States Supreme Court's landmark decision in Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192. There, the Court, in defining a union's obligations under the doctrine of fair representation, stated that discriminations based on race alone are obviously irrelevant and invidious and an employee's bargaining representative is not authorized to make such discriminations. The Court held that a collective-bargaining agreement entered into between the employer and the union was unlawful to the extent it discriminated against black employees on racial grounds, reasoning that the union, like the legislature, "is also under an affirmative constitutional duty equally to protect those rights," namely, the rights of being free from racial

discriminations which are "obviously irrelevant and invidious."

These important constitutional principles are equally applicable under the National Labor Relations Act. The Wallace Corporation v. N.L.R.B., 323 U.S. 248; Ford Motor Company v. Huffman, 345 U.S. 330; Humphrey v. Moore, 375 U.S. 335. Since Steele, racial discrimination in employment, whether by unions or employers, has been unlawful. Indeed Steele not only restrains the parties from engaging in, permitting, or tolerating provisions in bargaining agreements, or practices under or outside such agreements, which constitute or permit irrelevant and invidious discrimination, but affirmatively assigns a constitutional duty on the parties, both union and employer, to support the elimination of racial consideration.

Following the Court's constitutional pronouncement in Steele, this Board, in Tanner Motor Livery, Ltd., 166 NLRB 551 at 552, held that a union is required, by its duty of fair representation and by constitutional consideration, to fully support the elimination of racial discrimination, and that a protest of racial discrimination in employment by employees cannot be at cross-purposes with the union's position. Specifically, the Board held:

> For the Board to find, therefore, that employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy.

In addition, following Steele, no court has permitted the existence of a collective-bargaining agreement or practices under or outside such agreement to stay its hand in ordering an employer to eliminate racial discrimination. Indeed, employers have been permitted, and under Steele and subsequent pronouncements are constitutionally obligated, to change existing collective-bargaining agreement provisions and practices which have discriminatory effects, and such changes may be made free from threat of strike. See U.S. v. Local 189, United Papermakers, 282 F.Supp. 39, 42-44 (E.D. La., 1968). Additionally, the Board, in Miranda Fuel Company, Inc., 140 NLRB 181, held, and the Supreme Court in Vaca v. Sipes, 386 U.S. 171, 193, later indicated the correctness of that view, that employees must be protected from actions taken against them which are irrelevant, invidious, or unfair. It should be noted that in the latter case the Supreme Court criticized the Board for its "tardy" assumption of jurisdiction in these types of cases. In United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. N.L.R.B., 416 F.2d 1126, cert. denied 396 U.S. 903, the court held that an employer's maintenance of racial discrimination in his employment practices violates Section 8(a)(1) of the Act.

Finally, the constitutional doctrine enunciated by the Supreme Court in Steele and reaffirmed in various judicial opinions on numerous occasions thereafter has been embraced completely by the Congress in the enactment of Title VII of the Civil Rights Act of 1964. It is now crystal clear that the national labor policy itself specifically forbids racial discrimination in the terms and conditions of employment, and its existence is constitutionally forbidden and its presence is totally unlawful. It should also be noted, in passing, that here the labor agreement between

the parties fully embraced these judicial and legislative precepts.

Despite the constitutional requirements and the clear national labor policy barring racial discrimination, the National Labor Relations Board has been extremely reluctant to give effect to these principles. Indeed, it would appear that this very failure to grasp those principles recently precipitated the United States Court of Appeals for the Eighth Circuit, in N.L.R.B. v. Mansion House Center Management Corporation, 473 F.2d 471, to severely rebuke the Board in holding that the Board's participation in the maintenance of racially discriminatory practices violates the Due Process Clause of the Fifth Amendment. More specifically the court stated:

> That racial discrimination is so invidious as to be unjustifiable cannot be denied. Accordingly, any recognition or enforcement of illegal racial policies by a federal agency is proscribed by the Due Process Clause of the Fifth Amendment. See Gautreaux v. Romney, 488 F.2d 731, 740 (7 Cir. 1971); cf. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952). [Footnotes omitted.]

Again, in the court's words, it appears:

> When a union discriminates on the basis of race or color it invidiously deprives equal opportunity for employment to a large segment of working men. See Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563 (1962). When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing partici-

> pant in the union's discriminatory practices. Although the union itself is not a governmental instrumentality the National Labor Relations Board is. N.L.R.B. v. Mash-Finch Co., 404 U.S. 138, (1971). Moreover, here the Board seeks judicial enforcement of its order requiring collective bargaining in a federal court. Obviously, judicial enforcement of private discrimination cannot be sanctioned. Cf. Barrows v. Jackson, 346 U.S. 249 (1953); Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948). [Footnote omitted.]

As noted heretofore, following Steele, no court has permitted the existence of a collective-bargaining agreement or practices under or outside such agreements to stay its hand in ordering an employer or union to eliminate racial discrimination. It is now clear from the court's teachings in Mansion House that legislative provisions of the National Labor Relations Act cannot be used to avoid our national labor policy forbidding racial discrimination. Moreover, the Board is constitutionally barred from interpreting or enforcing the Act in any manner fostering such racial discrimination.

The Mansion House case, in several critical areas, is almost identical to the substance of the instant case. In Mansion House the employer urged that the union seeking to represent its employees practiced racial discrimination. In the instant case the Union is alleging that the Respondent, through its supervisor Wilson, is engaged in racially discriminatory practices. In Mansion House the employer argued that such racial discrimination is a relevant area of inquiry for the Board when this matter is raised as a

defense to its refusal to bargain. In the instant case the Union similarly argues that such racial discrimination as practiced by Respondent's supervisor is also a relevant area of inquiry for the Board when it is this alleged racial discrimination which is now being urged in its defense. In Mansion House, as in the instant case, evidence as to the alleged practices of racial discrimination was excluded.

Clearly, both cases pose the same charge of racial discrimination as an appropriate ground of Board inquiry. In Mansion House the Board seemingly recognized its obligation of inquiry but rejected the charge on the ground of insufficient evidence to justify the employer's challenge. Aside from concluding that the Board erroneously viewed the rejected evidence and applied the wrong standard in testing the discrimination charge, the court set forth in explicit terms the Board's constitutional obligation to consider charges of racial discrimination. Thus, the court stated:

> Nevertheless, aside from the public policy and national interests involved, we think constitional limitations on the Board's process required recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned.

As hereinbefore noted, the constitutional limitations apply equally to a union and an employer. Despite the Court's constitutional warning, my colleagues herein conclude that evidence of alleged racial discrimination is "immaterial."

Although the court in Mansion House was confronted with a charge of racial discrimination as a defense to a refusal to bargain, I cannot conceive that its conclusion

would have differed in the instant case where the charge of racial discrimination is raised as a defense to an 8(b)(1)(B) allegation. Indeed, in arriving at its conclusion, the court, in substantial part, relied on and applied that same body of constitutional law and national labor policy which I have heretofore set forth. Indeed, the court clearly pointed out, as I have frequently attempted to illustrate, that the National Labor Relations Act was not meant to be read and interpreted in a vacuum. Rather, the Act we administer must be read consistently in accord with constitutional requirements and other Federal statutes which comprise a part of our total national labor policy.[4] It is this acceptance of evidence regarding racial discrimination, whether presented as a defense to a Section 8(b)(1)(B) case or whether presented as a defense to a Section 8(a)(5) case, which is subject to the same constitutional mandate and requirement.

It follows from the foregoing, as I have heretofore indicated in my dissent in The Emporium, supra, that:

> As to discriminatory practices which are not derived from or are not inherent in the collective-bargaining agreement, employers are not only free unilaterally to eliminate such discrimination, but are dutybound to do so. . . . Nor may they shift their responsibility under the national labor policy to eliminate all racial discrimination to the union by making such illegal discrimination a matter solely within the jurisdiction of a grievance-arbitration procedure, thereby placing the burden largely on the union and providing

[4]See my dissents in The Emporium, 192 NLRB No. 19, and Jubilee Manufacturing Company, 202 NLRB No. 2.

> themselves with a ready defense to any and all concerted activities by their employees to directly eliminate discriminatory practices.

Similarly, an employer may not shift its constitutional responsibility under our national labor policy to eliminate all racial discrimination by hiding behind its right granted under Section 8(b)(1)(B) to select, free from coercion or restraint, representatives who may engage in racial discrimination, and thereafter declare itself free from all concerted activities by its employees or their collective-bargaining representative to eliminate the discriminatory practices of the selected employer representatives.

Section 8(b)(1)(B) declares it to be an unfair labor practice for a union to restrain or coerce an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances. It does not, however, declare it to be an unfair labor practice for a union to restrain or coerce an employer into correcting and eliminating racially discriminatory practices of a supervisor whom he has selected as his representative, short of restraining the employer in the selection of that individual. Indeed, since Steele, a union is constitutionally obligated to eliminate and assist in the elimination of all discriminatory racial practices, and to conclude otherwise would be to fly in the face of that extensive body of law comprising our total national labor policy referred to above. Thus, in my view, my colleagues warp the entire posture of this case by holding that in a 8(b)(1)(B) proceeding it is "immaterial" whether the employees' basic dissatisfaction with a supervisor stems from his purported discrimination on a racial basis or is based on a reverse discriminatory intent by the employees; namely, to have

only black foremen on the job. Such a conclusion precludes employees or their collective-bargaining representative, under the penalty of an 8(b)(1)(B) violation, from taking any action to alleviate or correct a supervisor's racially discriminatory conduct which an employer is constitutionally bound to eliminate, which the Union is constitutionally obligated to eliminate or rectify, and which its contract with the Respondent Union forbids. To read Section 8(b)(1)(B) to prohibit such action by the Union or by the employees causes the Section to become a shield for racial discrimination—a reading which Steele held cannot be given to any part of the Act without causing it to violate the Constitution.[5]

Plainly, the instant record is incomplete and incapable of forming the basis for proper and correct decision on the alleged 8(b)(1)(B) violation. Indeed, it leaves unanswered the basic and crucial question as to the employees' reason for withholding their services and Respondent Union's purpose in thereafter ratifying that work stoppage. The Respondent urges that it was not thereby seeking the ouster of Wilson, which it concedes would violate Section 8(b)(1)(B), but was using the work stoppage as a means of enforcing what to it was the only alternative course available to it, namely, to isolate Wilson's alleged oppressive and discriminatory conduct by having the employer reinstate

[5]In acknowledging that employees are free under Section 7 and 13 of the Act to invoke their "statutory" rights with respect to unreasonable or unfair conditions, my colleagues continue to pay only lip service to the mandates of our national labor policy and the constitutional requirements barring racial discrimination. Thus, here again, as in Mansion House, when confronted by serious charges of racial discrimination practiced by one of the parties now before us, my colleagues erect another section of the Act, this time, Sec. 8(b)(1)(B), as a bulwark against such charges and interposing that same section as a statutory excuse for failing to carry out the Board's constitutional obligation to consider such charges in relation to the violation alleged.

Davis as a buffer between Wilson and the predominately black work crew. Such action clearly is not per se violative of Section 8(b)(1)(B). It follows from the foregoing, and particularly from Mansion House, that any and all available evidence as to Wilson's alleged oppressive and racially discriminatory conduct is not only material, but is necessary, in order to reach a determination as to Respondent's motive for its action and whether it in fact violated Section 8(b)(1)(B) as alleged.

Moreover, I do not find persuasive the General Counsel's contention that the Respondent's posthearing motion to reopen the record should be denied as an afterthought merely because it for the first time alleged racially discriminatory conduct specifically. In this regard, I note that during the hearing, Respondent's efforts to establish Wilson's treatment of the work force as discriminatory were ruled as irrelevant and barred from further consideration by the Administrative Law Judge. In my opinion, these rulings of the Administrative Law Judge during the hearing, and now my colleagues' agreement with him, that such matters are irrelevant to the disposition of this case, are not in accord with our national labor policy, are not required by Section 8(b)(1)(B) of our Act, and deny the Respondent Union a fair hearing on the violation with which it is charged.

I would therefore grant the Respondent Union's motion to remand this case to adduce any and all evidence bearing on Wilson's allegedly oppressive and racially discriminatory conduct.

Howard Jenkins, Jr., Member
NATIONAL LABOR
RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

CASE 12—CB—1170

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO, LOCAL 478
(International Builders of Florida, Inc.)

and

L. R. Wilson, an Individual; Jack T. Brellis, Esq., of Miami, Fla., for the General Counsel; James R. Dressler, Esq., of Cocoa Beach, Fla., the Charging Party; Seymour A. Gorman, Esq., Mamber, Gopman, Epstein, Milan & Foosaner of North Miami Beach, Fla., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

PAUL E. WEIL, Trial Examiner: On December 21, 1970, L. R. Wilson, an individual, filed a charge with the Regional Director for Region 12 of the National Labor Relations Board (herein called the Board) alleging that Laborers' International Union of North America, AFL-CIO, Local 478, hereinafter called Respondent, caused Wilson's discharge as a supervisor in violation of Section 8(b)(1)(B) of the National Labor Relations Act, as amended, hereinafter called the Act. On June 28, 1971, the

Regional Director, on behalf of the General Counsel of the Board, issued a complaint and notice of hearing alleging that Respondent coerced and restrained an employer, International Builders of Florida, Inc., hereinafter called the Employer, in the selection of its representatives for the purpose of collective bargaining in violation of Section 8(b)(1)(B) of the Act. By its duly filed answer Respondent admitted and denied various allegations in the complaint and denied the commission of any unfair labor practices. On the issues thus joined the matter came on for hearing before me at Miami, Florida, on July 20 and 21 and August 23, 1971. All parties were present or represented by counsel and had an opportunity to adduce relevant and material testimony, examine and cross-examine witnesses, argue orally on the record, and file briefs. The General Counsel argued orally at the close of the hearing. A brief was received from Respondent. The Respondent has made a motion to reopen the record.[1]

Upon the entire record in the case, and in consideration of the argument and brief, I make the following:

Findings of Fact

I. Business of Employer

It is alleged and admitted that the Employer is a Virginia corporation doing business in Florida as a contractor in the building and construction industry and that in the course of its business it purchased and received in Florida in the calendar year 1970, goods and materials valued in excess of $50,000 directly from points outside the State of Florida.

[1]The General Counsel filed an opposition to the Respondent's motion, and Respondent filed a reply to General Counsel's opposition.

The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice Background

The Employer is engaged in the construction of a school near Miami, Florida. On June 25, 1970, the Charging Party, Wilson, contacted the construction superintendent, Elmer Powell, for whom he had worked before, with a view to employment as a laborer foreman. Powell arranged for an interview with a representative of the owner, Sharpe, after which he hired Wilson, to report next day.

Wilson was a member of the Orlando, Florida, Laborers' local at the time he was hired by the Employer. He wrote for a transfer which he received over the July 4 weekend and took with him to the jobsite on July 6. He showed the transfer letter to the acting steward on the job, Ben Adams, and said that he would take it down to the union hall. Adams suggested that he wait until the weekend or a rainy day so that he would not lose time from work to deposit it. At 10 a.m. the same day, Joseph Matthews and Leroy Newsom, business agents of Respondent, came to the jobsite. They sought out Acting Steward Adams and confirmed him as the official steward giving him a button and taking him to the construction shack to inform Powell that he had been confirmed as the official steward

of the Union. They then called for Wilson and Walked up to him. According to Wilson's account Matthews asked him what he was doing on the job, to which Wilson answered truthfully that he had been sent out by the hall.[2] Matthews also asked Wilson where his transfer was and Wilson displayed the transfer letter to him, whereupon, Matthews asked where Powell was. Powell arrived at the scene at about this time. Matthews turned to him and told him that Wilson could not work as a foreman because he was not cleared by Washington. Powell asked how long clearance would take and Matthews said that it would take a few days, whereupon Powell appointed Eugene Davis as a temporary foreman.

Between July 6 and August 4 the job continued with Wilson acting as a general foreman and Davis as a temporary foreman under Wilson's direction.[3] Between July 6 and August 4 Wilson, on two or three occasions a week, asked Acting Steward Adams whether he had yet been cleared into the Local. Adams, who occasionally went to the union hall, told him that he had not. Wilson also attempted to find out what Washington clearance was required because in his experience no clearance from Washington had

[2]Wilson had secured a referral from Respondent's hiring hall on June 25 which he deposited with the Employer on June 26 after showing it to Acting Steward Adams.

[3]I do not credit Davis' testimony that he did not act as a foreman and that his daily activities did not change in any way after his appointment as temporary foreman. I deem it irrelevant, in the context of this case whether he acted as a foreman, but all the evidence, with the exception of his, indicates that he gave directions to the other laborers on the job, acted as a conduit for the orders of Wilson and Powell, and occasionally assisted in the work of the laborers. Whether he was a supervisor during this period, within the definition of the Act, is immaterial.

ever been required in traveling from local to local. Powell continued to ask Wilson to ascertain his status.

On August 4 Sharpe spoke to Powell suggesting that the Employer could no longer afford to carry two laborer foremen on the job and suggested that Powell demote Davis until enough laborers were working on the job to warrant a second foreman.[4]

On the afternoon of August 4 Powell called Wilson and asked him if he could handle the laborers alone. Wilson assured Powell that he could. There is some evidence that on this occasion Wilson informed Powell that he had been cleared by the local. Wilson then notified the shop steward, Adams, that he was going to demote Davis and informed Davis that until more laborers were hired he did not need a second foreman and that he would be demoted to the capacity of laborer.

Adams immediately went to the telephone and called Business Agent Newsome, in whose territory the job is located. He informed Newsome of the demotion of Davis and, according to his testimony, Newsome made no answer whatsoever.

On August 5 when the laborers were supposed to start work at 8 a.m. they gathered across the street from the project and refused to start work. Wilson asked Shop

[4]Under the terms of the contract when more than two employees are employed on the job a foreman must be hired who shall be a member of the unit. When the number of laborers on the job reaches 15, the foreman who theretofore received 50 cents in excess of the laborer's rate, should be raised to 75 cents over the laborer's rate. A second foreman, if one is hired, would be employed at 50 cents an hour and the first foreman at 75 cents an hour may bear the title, general foreman.

Steward Adams why the men were on strike. Adams said he did not know, but that the business agent would be out later. A picket sign was carried by an unidentified employee stating "International Builders refused to abide by the agreement," and the Respondent's name was printed on it.

Powell attempted to find out what the trouble was. He talked to Wilson who told him he did not know what was going on and went across the street and stayed with the men. Powell next asked Shop Steward Adams what the trouble was and whether he could straighten it out. Adams answered only "you will have to talk to the business agent when he gets out here."

Around 10 o'clock Business Agent Matthews came to the jobsite. He and Adams talked to Powell. Powell asked what he had done now and Matthews answered "what do you mean making Wilson foreman." Powell answered that Wilson had said he was cleared into the Local to which, according to Powell's testimony, Matthews answered that Wilson had to be a member in good standing for a year before he could be a general labor foreman. Powell said he had never heard of such a thing and asked if they had any suggestions, whereupon Adams said "why don't you put Davis back on." Powell asked if he did not, what would happen, and Adams answered "Do you want the men back to work? You had better put him back on." Powell wanted to know what he was going to do with two foremen and Matthews said "that is your problem." Powell told Davis that he was foreman again and Matthews told Adams to tell the men to go back to work.

The above account, which was given by Powell, was sharply contradicted by both Adams and Matthews. Adams testified that he and Matthews went into the trailer with Powell and that Matthews asked Powell what had happened to the foreman. Powell explained that the Company was not going to let him have two foremen and he was going to have to put Davis back as a laborer until the group grew larger and then he would put him back to work as a foreman. Matthews said that the men refused to work under Wilson and Adams said that the men wanted a black foreman.[5] Then Powell said there was not much he could do because the owner would let him have only one foreman. Matthews said that the men would not go to work unless Powell settled the matter, whereupon Powell said that he would put Davis back to work as a foreman if that was what it was going to take for them to go to work. When Powell had agreed to put Davis back, Matthews and Adams walked out of the office and Adams told the men that it had all been settled and they could go to work. Adams denied that anything was said about Wilson not being able to be a foreman unless he had been in the Union for a year.

Matthews gave a third version of the conversation. He stated that he walked up to Powell in the trailer with Adams and said "What is the problem here?" Powell told him that the men refused to work, whereupon Matthews asked Adams why the men had refused. Adams said the men wanted Davis as a foreman, they did not want him demoted. Matthews then told Powell that he had a problem on his hands, whereupon Powell answered that he had to cut back to one laborer foreman. Matthews suggested he

[5]Most of the laborers on the job were Negroes, as were Matthews and Newsome. Powell and Wilson are white.

get his boss on the telephone and Powell said that he thought he could handle it himself and suggested that he promote Davis is foreman, whereupon Powell left, telling Adams to get the men back to work, that the thing was settled.

Matthews and Newsome both testified that there is no rule of Respondent that requires that a man could not be appointed general foreman until he had been in the Local for at least a year.

Respondent called a number of employees to testify as to the work stoppage. Without exception they all testified that they arrived after a group of employees had formed who had refused to go to work and that their complaint was that Davis had been removed from the foreman's job. None of them knew the men who first refused to go to work and none of them knew who the man was who had a picket sign or how he happened to have the sign. He was identified only as "a guy from Homestead" and a new employee. Some of the employees testified that the picket carried the sign, others that he leaned it against a car parked across the street from the jobsite. None of them agreed with the testimony of Matthews that the picket was walking up and down the road on the project side of the road. Two of the witnesses testified that they had read the picket sign and that the legend on it was "Picket" or "Picket sign" and that the name of the Union appeared on it. Only Matthews testified as to the legend I have found above on the sign. No one knew what happened to the sign after the incident.

I credit the testimony of Powell as to the meeting with Matthews and Adams, although in my view of the case, it does not make a great deal of difference.

The Employer continued operating using two foremen until August 21, on which date Sharpe, representing the owner, suggested to Powell that he was no longer warranted in keeping a second foreman on the job. At this time Powell discharged Wilson telling him that he could not afford a second foreman and that he would have to discharge Wilson because of the pressure of the Union.

Discussions and Conclusions

It appears clear and I find that Wilson was discharged because the Employer did not feel that it could justify the presence of two foremen on this rather small job. The Employer had two foremen solely because of the work stoppage and the pressure caused thereby when it attempted to reduce Davis to a rank-and-file employee. Although Davis testified that he did not operate as a foreman at any time prior to that occasion, it is difficult to see why employees should have struck to keep him in that position, if his testimony were true. Respondent contends, and the evidence seems to bear out their contention, that there were complaints voiced to Respondent and by Respondent to the Employer that Wilson "pushed" the employees, that is to say he stood over them and required them to keep working more than the employees liked. While the testimony of the union agents and of Powell and Wilson indicates that the complaint of the employees was against Wilson, the employees all testified that the strike was caused by the demotion of Davis.[6] However, this is not an

[6]It is immaterial whether the employees' basic dissatisfaction with Wilson stemmed from his purported discrimination on a racial basis, or a reverse discriminatory intent by the employees. Whatever the dissatisfaction may have been, the Union is barred by Section 8(b)(1)(B) from coercing and restraining the Employer in its selection of Wilson as its representative. Respondent's motion to reopen the proceeding to take evidence concerning Wilson's purported racial discrimination is denied.

irreconcilable conflict inasmuch as the employees' protest of the demotion of Davis may have resulted from the fact that he stood as a buffer between them and Wilson.

The real issue as I see it is whether the work stoppage of August 5 was directed, adopted or ratified by Respondent so that it is responsible for the results thereof.

There is insufficient evidence on the record to support a finding that the Respondent caused the work stoppage although the facts adduced are very suspicious. It is improbable to me that, if indeed the employees were upset over the demotion of Davis, Newsome, on being informed of this fact by Shop Steward Adams on August 4, would have made no comment nor given any directions or instructions to the shop steward. It is a somewhat remarkable coincidence, in my opinion, that an employee just happened to have an official printed union picket sign in the back of his car and that somehow the Employer's name was placed on the picket sign. It is certainly a suspicious circumstance that no one knew who commenced the work stoppage and no one could identify the first five or six employees who engaged in it or the man who carried the picket sign. The testimony of the employees who took part in the work stoppage is not wholly credible as, for instance, those who testified that the legend of the picket sign was "Picket" or "Picket sign." But suspicions and coincidences are not evidence and a finding cannot be based on them alone. On the other hand, it is clear that the Union's agent on the scene, Adams, did nothing to stop the work stoppage. In fact, he joined it. That he had no doubt that this was a union matter appears clear. When asked by Powell why the men were not working, Adams refused to tell him

stating only that the business agent was on his way. When the business agent appeared he made no effort to send the men back to work.[7]

In the conversation between Powell, Matthews, and Adams, Matthews made no protestations that the Union was not involved in the matter, but instead, under any of the testimony given, attempted and succeeded in furthering the employees' demands. Finally it was Matthews, the union agent, who determined that the employees were satisfied and told Adams to get them back to work. Adams did so without explanation to the employees, a factor which militates against a finding that the employees were ceasing work on an individual basis or on a basis other than through the Union's aegis. Finally, the employees returned to work immediately upon being told that the issue was resolved without seeking assurance that their grievance no longer existed. From the above, I conclude only that the Union, in the person of Matthews, unquestionably a union agent with authority to take action in this field, ratified and condoned the work stoppage of the employees and is responsible therefor.

I conclude further that the work stoppage had as its object either the removal of Wilson as general foreman or the reinstatement of Davis as foreman in Wilson's place or under Wilson. I find that Respondent was notified by management in the person of Powell that the job did not warrant two foremen and that Respondent therefore was aware of the fact that a requirement that Davis be named

[7]Matthews told the picket to take the sign down. At first blush this could be construed as an order to cease the activity. However, as one of the striking employees, Julius Dunmeyer, testified, Matthews took the picket sign down because he himself did not want to cross the picket line in order to talk to Powell.

foreman meant that Wilson could not remain as foreman. Accordingly, I find that Respondent by its ratification and condonation of the work stoppage, if not its causation of it, restrained and coerced Employer in the selection of its foreman on the job.

Section 8(b)(1)(B) of the Act forbids the restraint and coercion of an employer in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances. I have found above that Respondent coerced and restrained the Employer herein in the selection of its foreman and general foreman. The question remains whether Wilson was a representative of the Employer for the purposes of collective bargaining or the adjustment of grievances. The record is clear that Wilson had the functions, among others, of selecting the employees who were assigned to the various jobs done on the jobsite by laborers, such as assisting in the concrete pouring, assisting carpenters, filling water containers, and otherwise doing the work on the jobsite in which craftsmen are not involved. Further, according to the testimony of Shop Steward Adams, various complaints came up on the jobsite which he took up with Wilson, including complaints that more water containers were needed on the jobsite or that water containers had gone dry, that Wilson was pushing the men too hard, that more men were needed on the crew, a specific example being the addition of two men to the operation of concrete vibrating machines, and various other grievances under the terms of the contract or that stemmed from the working conditions on the jobsite. It does not appear that Adams would have taken these matters up with Wilson if Wilson had not, in Adams' contemplation, been a person who could remedy the situation and it appears from the testimony of various witnesses

that some of these situations were rectified or changed by action of Wilson.

It appears that after Wilson's departure, Davis did approximately the same work that Wilson had done. There is no showing that he was any less the representative of the Employer for the purposes of handling complaints and grievances brought up by the shop steward than Wilson had been. I find that the handling of such grievances on the day-by-day activities on the jobsite constitutes the adjustment of grievances on behalf of the Employer. Accordingly, I find that the Union, by the acts and conduct found above, interfered with the selection by the Employer of its representative for the purposes of the adjustment of grievances or collective bargaining in violation of Section 8(b)(1)(B) of the Act.[8]

Conclusions of Law

1. Laborers' International Union of North America, AFL-CIO, Local 478, is a labor organization within the meaning of Section 2(5) of the Act.

2. International Builders of Florida, Inc., is an employer as defined in Section 2(2) of the Act engaged in commerce or in industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The positions of laborer's general foreman and in the absence of a general foreman, laborer's foreman for

[8]Local Union No. 101, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Fruehauf-Fischbach Automation), 191 NLRB No. 108; New Mexico District Council of Carpenters and Joiners of America (A.S. Horner, Inc.), 177 NLRB No. 76.

International Builders of Florida, Inc., are supervisory positions within the meaning of Section 2(11) of the Act and occupants of said positions are representatives of the Employer for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By engaging in work stoppages and threatening to engage in further work stoppages the Respondent coerced and restrained the Employer within the meaning of Section 8(b)(1)(B) of the Act in order to compel said Employer to rescind its decision to hire L. R. Wilson as laborer's general foreman and to install Eugene Davis as laborer's foreman on the South Miami school project of International Builders of Florida, Inc.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the Employer's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to affect the policies of the Act.

Having found that the Respondent restrained and coerced the Employer to discharge L. R. Wilson as a laborer's general foreman, I shall recommend that the Respondent, through its officials, notify the Employer that it has no objection to the Employer hiring Wilson in the capacity formerly held by him. I shall further recommend that the Respondent make Wilson whole for any loss of earnings he may have suffered as a result of the unlawful conduct found herein. The backpay, if any, shall be computed on a quarterly basis in the manner described in F. W. Woolworth Company, 90 NLRB 289, and with interest therein at 6 percent per annum computed in the manner set forth in Isis Plumbing & Heating Co., 138 NLRB 716.

Accordingly, upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, pursuant to Section 10(b) of the Act, I make the following recommended:

ORDER[9]

1. Respondent, Laborers' International Union of North America, AFL-CIO, Local 478, its officers, agents, and representatives shall cease and desist from:

(a) Restraining and coercing the Employer in the selection and retention of its representatives for the purpose of collective bargaining and adjustment of grievances.

[9]In the event no exceptions are filed by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Engaging in work stoppages or threatening to engage in work stoppages for the purpose of coercing and restraining the employer in the employment of representatives of its own choosing and the substitution therefore of representatives of Respondent's choosing for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify International Builders of Florida, Inc., that the Respondent has no objection to the employment of L. R. Wilson as laborer foreman by International Builders of Florida, Inc.

(b) Make whole in the manner set forth in the section of the Decision entitled "The Remedy," L. R. Wilson for any loss of earnings he may have suffered as a result of the unlawful conduct which caused the Employer to discharge him as general foreman on the South Miami school project.

(c) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous

[10]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 12 signed copies of said notice for posting by International Builders of Florida Inc., provided the Employer is willing, at its construction offices.

(e) Notify the Regional Director for Region 12, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[11]

Dated at Washington, D. C.

PERTINENT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

Section 2(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed

[11] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(b)(1)(B)

It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 10(c)

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the

Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further required such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is before a member of the Board, or before an examiner or examiners thereof, such member,

or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

PERTINENT PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. §2000e - 2.(a)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Office of the General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570, Counsel for the Respondent. I further certify that all parties required to be served have been served.

THOMAS J. PILACEK
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Telephone: (305) 947-4521

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-545

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Between July 6 and August 4, 1970, International Builders of Florida, Inc. employed L. R. Wilson, a white man, as general foreman, and Eugene Davis, a black, as a temporary foreman (Pet. App. 23-24). On August 4, the Company, believing that Wilson had been cleared by the Union,[1] told Davis and the Union that the job did not warrant two foremen and, accordingly, that Davis would be returned to laborer status (Pet. App. 24-25). The next day, the employees, represented by the Union, struck and the Company, in response, reinstated Davis as a foreman (Pet. App. 25-26).

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[1]Wilson was a member of another local and the Company agreed to hire him as a temporary foreman pending clearance by the Union (Pet. App. 23-24).

The Company continued to operate with both Wilson and Davis serving as laborer foremen until August 21, when Wilson was discharged because the Company could not afford two foremen (Pet. App. 29). After Wilson's departure, Davis was told that he was the general laborer foreman and that he was to supervise the laborers; his functions included the handling of employee grievances (Pet. App. 33). Wilson then filed an unfair labor practice complaint with the Board (Pet. App. 21).

2. The Board (Member Jenkins dissenting) held that the Union had "restrain[ed] or coerce[d] * * * [the Company] in the selection of his representatives for the purposes of * * * the adjustment of grievances," in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) (Pet. App. 7-8; 32-33). The Board denied the Union's motion to reopen the record for the purpose of producing evidence regarding racially discriminatory or oppressive working conditions under Wilson. The Board explained (Pet. App. 8):

> Contrary to our dissenting colleague, we do not view our decision as barring the protest of the Employer's employees with respect to Wilson's treatment of them, whether or not it was racially motivated. Clearly, Wilson, while a general foreman, was an agent of the Employer and the conditions of employment which he imposed upon the employees were the Employer's conditions. At all times the employees were free under Sections 7 and 13 of the Act to invoke their statutory rights with respect to these alleged unreasonable or unfair conditions. * * * This is not to say, however, that the right to strike or engage in concerted activity because of unfair conditions of employment includes the right to dictate to an employer the selection of

> a particular supervisor, here Davis, who would have the power to engage in collective bargaining or adjust grievances. The Administrative Law Judge found, and we agree, that both Wilson and Davis had the power, and did, adjust grievances for the employees. Under these circumstances, we hold that the Respondent Union, whatever its motivation, could not by restraint and coercion force the Employer to select Davis rather than Wilson for such purposes.

The Board ordered the Union, *inter alia*, to "notify the Employer that it has no objection to the Employer hiring Wilson in the capacity formerly held by him * * * [and to] make Wilson whole for any loss of earnings he may have suffered as a result of the unlawful conduct found herein" (Pet. App. 35).

3. The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. 3-6). The court stated (Pet. App. 4-5):

> The Union argues that the prohibition of §8(b)(1)(B) must yield to the right of workers to be free of racial discrimination in their employment. The Board responds that the employees may fully assert their right to non-discriminatory treatment, through legal remedies as well as self-help measures protected by Section 7 of the Act, so long as they protest the discriminatory treatment and do not demand the removal or appointment of a particular management "representative." In short, the Board says that protest must be directed, at least in the ordinary case, at the alleged discriminatory conduct, rather than the identity of the supervisor whose conduct is challenged.
>
> We believe the Board's principle is a reasonable harmonization of Section 7 and 8, and that the principle was properly applied in this case.

4. The petition (p. 3) raises only the issue whether the Board has power to award backpay to a wrongfully discharged supervisor. Since that question was not raised before the Board or the court of appeals, it cannot be

raised here. Section 10(e) of the Act, 29 U.S.C. 160(e), forecloses from judicial review any objection not presented to the Board in the party's exceptions to the Administrative Law Judge's decision. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. Petitioner's exceptions to the Law Judge's decision did not challenge the backpay award.[2] Similarly, this Court has consistently held that issues not raised in the courts below will not be entertained on review here. *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In the court of appeals, petitioner's "sole contention * * * [was] that the Board erroneously ruled evidence of racial discrimination irrelevant"[3] (Pet. App. 4).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JANUARY 1975.

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[2]Petitioner's exceptions are set out in the appendix to the briefs printed for use in the court of appeals, Volume II, pp. 475-477. A copy has been lodged with the Clerk.

[3]Copies of petitioner's brief and reply briefs in the court of appeals have been lodged with the Clerk.

[4]The fact that the Ninth Circuit's decision in *National Labor Relations Board* v. *Silver Bay Local Union No. 962*, 498 F.2d 26 (Pet. 6), was not entered until May 22, 1974, does not excuse petitioner's failure to raise the backpay issue in timely fashion. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

Petitioner's reliance on *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8) (Pet. 8), is misplaced. The issue there was whether the Board had power to issue a bargaining order in favor of a union which had racially discriminatory membership policies.

SUPREME COURT, U. S.
FILED
JAN 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-545

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S MEMORANDUM IN REPLY

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MIAMI REVIEW — 371-4853 — 377-3721

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PETITIONER'S MEMORANDUM IN REPLY

The Board opposes the Petition on the procedural ground that both points raised in the Petition are foreclosed from review by this Court, because Petitioner's exceptions to the Law Judge's Decision did not specifically

challenge the backpay award and because the issues were not argued in the Court below. (Mem., p. 4) The Board is simply incorrect in its assertion that certiorari should be denied on these bases.

I. Exception No. 4[1] disputes the Law Judge's failure to integrate Title VII provisions with the provisions of the Act. Point II of the Petition goes to that very problem: that the *Mansion House* decision,[2] which declared that judicial enforcement of racial policies prohibited by Title VII is proscribed by the due process clause of the Fifth Amendment, conflicts in principle with the instant case because Title VII provisions were not integrated with the Act in determining the backpay award to Wilson. As Petitioner subsequently argued to the Court of Appeals:

> "like in *Mansion House*, the order in this case perpetuates race discrimination by running in favor of an employer who selected a representative who practiced race discrimination in the performance of his supervisory functions. In addition, the make-whole remedy in this case (ALJ 11, A.473; D&O 2-3, A.479-80) runs squarely in favor of Wilson, the person alleged to have perpetrated the discriminatory job conditions upon the laborers."[3]
>
> * * *
>
> "The Board's cross-application for enforcement of the instant order is a request that this Court

[1]Appendix to briefs for use in the Court of Appeals, Volume II, pp. 475-6.

[2]*NLRB v. Mansion House Center Mgt. Corp.*, 473 F.2d 471 (CA8, 1973), relied on by Petitioner in the Court of Appeals.

[3]Petitioner's reply brief, p. 7.

> unconstitutionally perpetuate race discrimination and, in fact, reward the discriminatory supervisor. That request should not be granted."[4]

The issue before this Court in Point II was thus properly preserved by exception and argued to the Court below, contrary to the Board's assertion.

II. The precise issue raised in Point I[5] of the Petition was, as the Board correctly states, neither specifically preserved by exception on the precise ground presented nor argued to the lower court on that basis. But it did not have to be.

The Ninth Circuit specifically noted in connection with the issue raised in Point I:

> "We have not found one case or Board decision in which a supervisor was awarded backpay as the result of an 8(b)(1)(B) violation." *Silver Bay*, 498 F.2d at 29

It therefore cannot be denied that the decision below, silent as it is on the backpay issue, does violence to the more than twenty-five years of experience under the Act.

Although the court in *Silver Bay* specifically refrained from ruling that the Board exceeded its statutory author-

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[4]id., p. 17.

[5]That the Board exceeded its statutory authority in the backpay award, pursuant to *National Labor Relations Board v. Silver Bay Local Union 962, International Brotherhood of Pulp, Sulphite & Paper Mill Workers*, 498 F.2d 26 (CA9, 1971).

ity in the backpay award there, we submit that that result is inescapable in view of the express statutory provisions relied on in the instant Petition. And this Court has ruled that exceptions are not necessary in cases where the Board has "patently traveled outside the orbit of its authority." *NLRB v. Cheney California Lumber Company*, 327 U.S. 385, 388.

Secondly, the purpose of the exceptions was to seek to overturn the violation found by the Law Judge. Had Petitioner been completely successful in this endeavor, the backpay award would necessarily have fallen with it. Under such circumstances a specific challenge to the backpay award would have been a useless redundancy.

In this regard we point out that the violation found by the Law Judge consisted of Petitioner's causing Wilson's discharge,[6] whereas that found by the Court of Appeals consisted of causing Davis' reappointment:

> "The Board held that the union, by *insisting upon the reappointment of Davis*, violated . . . Section 8(b)(1)(B) of the . . . Act." (Pet., App. 4)

Under this finding the backpay award should have fallen *a fortiori*, upon the challenge raised in the Court of Appeals.

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[6] Appendix to Appellate Briefs, Volume II, page 10:
"Having found that the Respondent restrained and coerced the supervisor *to discharge L. R. Wilson* . . . I shall further recommend that the Respondent make Wilson whole for any loss of earnings he may have suffered . . . ."

Finally, the Court has jurisdiction to determine novel issues of importance which involve construction of statutes. *American Federation of Musicians v. Wittstein*, 379 U.S. 171, particularly where the ruling below does violence to a well-established construction of the statutes by the administrative agents charged with its enforcement. *Patterson v. Lamb*, 329 U.S. 539.

Under the above principles, we submit that review is warranted where only two cases since the Act was enacted have permitted backpay awards to supervisors discharged as the result of a §8(b)(1)(B) violation. It is particularly appropriate where one of those cases, *Silver Bay*, struck down the award.

CONCLUSION

For the above reasons, and those presented in the Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

THOMAS J. PILACEK
Counsel for Petitioner

January, 1975